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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

PILCHUCK AUDUBON SOCIETY; and)	Civ. No.
PUBLIC EMPLOYEES FOR)	
ENVIRONMENTAL RESPONSIBILITY,)	COMPLAINT FOR DECLARATORY
)	JUDGMENT AND INJUNCTIVE RELIEF
Plaintiffs,)	
)	
v.)	
)	
NATIONAL MARINE FISHERIES)	
SERVICE,)	
Defendant.)	

INTRODUCTION

1. This action challenges a biological opinion issued by the National Marine Fisheries Service under Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), for the 41st Street Overcrossing Freight Mobility Project (“the 41st Street Project”) – a proposed highway project in Everett, Washington. The biological opinion concludes that the 41st Street Project will not jeopardize the continued existence of threatened Puget Sound chinook salmon (*Oncorhynchus tshawytscha*) or result in destruction or adverse modification of the salmon’s designated critical habitat. This action challenges the biological opinion because the scope of the biological opinion is unduly narrow; it misses key impacts on threatened Puget Sound salmon; it runs counter to the evidence before the agency and prior determinations made

1 by the agency; it fails to independently assess the project's impact on designated critical habitat;
2 and it authorizes the Federal Highway Administration, the WSDOT, and the City of Everett to
3 proceed with actions that are likely to jeopardize threatened Puget Sound chinook salmon and
4 result in adverse modification of the species' designated critical habitat within the meaning of the
5 Endangered Species Act ("ESA").

6 2. For these reasons, this action seeks a declaration that the biological opinion is
7 arbitrary, capricious, and contrary to the ESA's consultation requirements, 16 U.S.C. §
8 1536(a)(2), in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). This action
9 also seeks an injunction directing National Marine Fisheries Service ("NMFS") to withdraw the
10 biological opinion and to rescind the accompanying incidental take permit.

11 JURISDICTION AND VENUE

12 3. This action is brought pursuant to the Administrative Procedure Act, 5 U.S.C. §
13 706. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

14 4. Venue is proper under 28 U.S.C. § 1391(e) because defendant NMFS has its
15 Northwest regional office, which developed and issued the challenged biological opinion, in this
16 district.

17 PARTIES

18 5. Plaintiffs in this action are:

19 A. Pilchuck Audubon Society ("Pilchuck"), a non-profit corporation, is a
20 local chapter of the National Audubon Society with approximately 1600 members in Snohomish
21 County and Camino Island, Washington. Since its formation in 1970, Pilchuck has been actively
22 involved in the preservation and restoration of wildlife and fish in those areas, including Puget
23 Sound salmon. One of Pilchuck's programs, SmartGrowth, educates citizens on how to
24 effectively participate in the land use process to protect neighborhoods, rural areas, and wildlife

1 in Snohomish County. In addition, Pilchuck is part of a campaign to protect salmon habitat by
2 securing state recognition for thousands of miles of salmon-bearing streams.

3 B. Public Employees for Environmental Responsibility (“PEER”) is a non-
4 profit corporation based in Washington, D.C. with chapters throughout the United States,
5 including Washington State. PEER’s Washington chapter is located in Olympia, Washington.
6 PEER works to hold federal, state, and local governments accountable to enforce their statutory
7 environmental mandates and to practice scientific integrity in their actions. PEER has 1,000
8 citizen and employee members in Washington State.

9 6. Plaintiffs and their members use the Snohomish River, its tributaries, and the
10 adjoining shoreline for recreational, scientific, and aesthetic purposes. Plaintiffs and their
11 members derive, or but for the threatened status of Puget Sound salmon, would derive
12 recreational, scientific, and aesthetic benefits from the existence in the wild of Puget Sound
13 salmon through wildlife observation, study, and photography and recreational fishing. The past,
14 present, and future enjoyment of these benefits by plaintiffs and their members has been, is
15 being, and will continue to be irreparably harmed by NMFS’s disregard of its statutory duties
16 and by the unlawful injuries imposed on Puget Sound chinook salmon by the proposed 41st
17 Street Project.

18 7. The aesthetic, conservation, recreational, and scientific interests of these groups
19 and their members in the survival and recovery of Puget Sound chinook salmon, as well as in the
20 compliance with environmental law by federal agencies, have been, are being, and, unless the
21 relief prayed for is granted, will continue to be directly and adversely affected by the failure of
22 NMFS to comply with the law.

8. Defendant in this action is the National Marine Fisheries Service, an agency of the United States Department of Commerce responsible for administering the provisions of the ESA with regard to threatened and endangered marine species, including threatened Puget Sound chinook salmon.

BACKGROUND

Threatened Puget Sound Chinook Salmon

9. In their relatively short life span, chinook salmon undertake a heroic journey from freshwater rivers and streams to the Pacific Ocean and then back to the waters of their birth, where they spawn and die. This journey has grown increasingly perilous with human activity blocking or altering streams and rivers, polluting fresh and saltwater habitat, and drastically reducing the number of streams and rivers that offer the clean, cool water needed by chinook and other anadromous fish. Many chinook salmon populations have declined precipitously over the last several decades and are now listed as endangered and threatened species under the ESA.

10. Due to the decline of Puget Sound chinook salmon, NMFS listed Puget Sound chinook as a threatened species in 1999. See 64 Fed. Reg. 14,308 (Mar. 24, 1999). This population includes chinook in Puget Sound and Hood Canal north to the Canadian border. Id. at 14,313.

11. Habitat degradation and loss due to urban and suburban development has been a major factor in the decline of the Puget Sound chinook. Id. at 14,318-19. In other fora, NMFS has stressed the importance of reducing impervious surfaces, which increase polluted run-off into streams and wetlands, adversely affect peak river flows and erosion rates, and fill and destroy vital off-stream habitat. NMFS has also noted the need to prevent and treat increased stormwater run-off and the importance of protecting and restoring streamside riparian buffers.

1 12. To help protect vital habitat from further degradation, NMFS designated critical
2 habitat for Puget Sound chinook on February 16, 2000. 65 Fed. Reg. 7764 (Feb. 16, 2000)
3 (codified at 50 C.F.R. § 226.212). The designation includes “all marine, estuarine and river
4 reaches accessible to listed chinook salmon in Puget Sound,” 50 C.F.R. § 226.212(a), and
5 specifically includes the Snohomish River, id. Table 7.

6 The Snohomish River Watershed

7 13. The Snohomish River watershed is the second largest drainage in Puget Sound
8 and includes the Skykomish and Snoqualmie Rivers. The watershed extends from Stevens Pass
9 in Snohomish County and Snoqualmie Pass in King County west where it enters Puget Sound by
10 the City of Everett and the Tulalip Tribes Reservation.

11 14. The rivers, streams, and estuaries that make up the Snohomish River watershed
12 offer diverse habitat for many species of wildlife. Bald eagles, osprey, blue herons, and
13 peregrine falcons use the area for nesting and foraging, and the watershed includes a population
14 of Rocky Mountain elk along with black-tailed deer. Four types of salmon -- chinook, coho,
15 pink, chum -- as well as steelhead, coastal cutthroat trout, and bull trout, rear and spawn
16 throughout the watershed and use the mainstems for their migration to the Pacific Ocean. Puget
17 Sound chinook are especially dependent on the habitat offered by the estuaries since some
18 chinook juveniles spend a year or more in the estuaries before entering the ocean.

19 15. Approximately 85% of the historic salmon habitat has already been lost in the
20 Snohomish River estuary. Much of the remaining habitat in the Snohomish River estuary shows
21 signs of degradation, and as a result, the rearing capacity has decreased approximately 40-60%
22 from the early 1880s. The lower Snohomish River is one of the few remaining areas that
23 provides critical off-channel habitat for salmon.

1 16. The mainstem and floodplain of the Snohomish River also suffers from
2 degradation. Mainstem rearing capacity has been reduced 75% relative to historic habitat while
3 the floodplain's rearing capacity has been reduced by approximately 96%. The remaining
4 salmon habitat, therefore, is of vital importance to Puget Sound chinook. Along with existing
5 estuary and off-channel habitat, the shorelines and adjacent floodplains offer great restoration
6 potential. NMFS has stated that restoration efforts could potentially increase natural production
7 and survival of juvenile chinook by 5,000 smolts annually.

8 Development Along the Snohomish River

9 17. Everett, Washington is a city of approximately 86,000 people 45 miles north of
10 Seattle. The city sits on a peninsula between the Snohomish River and Puget Sound.

11 18. Interstate 5 ("I-5") runs through Everett, with the majority of the City lying
12 between the Puget Sound at the western border and I-5 at the eastern border. To the east of I-5
13 and west of the Snohomish River, the historic Lowell neighborhood contains some of the last
14 significant open space in Everett. This complex of wetlands and streams has been impacted by
15 human activity for many years, but it still offers critical habitat for Puget Sound chinook.

16 19. In the northern end of the Lowell neighborhood lies the Everett Landfill/Tire Fire
17 Site ("Landfill Site"). The Landfill Site is a triangular area of approximately 70 acres owned by
18 the City of Everett, bordered on the east by railroad tracks and the Snohomish River and on the
19 west by additional railroad tracks. The northern border is 36th Street. The Snohomish County
20 Transfer Station, the Everett Animal Shelter, and a City storage yard are located on the northern
21 end of the Landfill Site.

22 20. The Landfill Site has a relatively shallow aquifer with elevation heads of 6 to 16
23 feet, a confining layer, and a deep aquifer. The deep aquifer is hydrologically connected to the
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1 Snohomish River. The shallow aquifer has contaminants including benzene, beta
2 hexachlorocyclohexane, nickel, and zinc.

3 21. Everett has conducted an Environmental Protection Agency Brownfields Analysis
4 of the Landfill Site to study whether the Landfill Site could be developed in the future.
5 Development of the Landfill Site would result in approximately 50 acres of impervious surface.

6 22. Directly south of the Landfill lies a former timber mill site known as “the
7 Simpson Site.” Everett purchased the Simpson Site in the early-1990s with the intent to turn the
8 relatively empty area into a waterfront development of shops and housing. The 140-acre
9 Simpson Site has over 70 wetlands within its borders, beaver dams, and Bigelow Creek, critical
10 habitat for chinook salmon. The planned development of the Simpson Site would result in
11 approximately 39 acres of impervious surface.

12 23. The Lowell River Road runs along the southern end of the Simpson Site. The
13 Lowell River Road is located along a dike next to the mainstem of the Snohomish River and
14 extends seven miles to the town of Snohomish. The road has been closed since the mid-1990s,
15 when the dike failed during winter flooding and a portion of the road washed away. The road is
16 scheduled to reopen in fall 2001.

17 24. The City plans to build a new “Riverfront Parkway” across the Simpson Site that
18 will connect with the Lowell River Road and result in approximately 8 acres of impervious
19 surface. The development of the Simpson Site is dependent on the Riverfront Parkway roadway
20 improvements.

21 25. Along the Lowell River Road south of the Simpson Site, Everett intends to build
22 an athletic fields complex. The complex would be approximately 89 acres in size and include
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1 baseball fields, roads, and parking lots. The site currently provides habitat for fish and wildlife,
2 including salmon.

3 The 41st Street Project

4 26. The City has taken the first step in its Landfill and Simpson Site redevelopment
5 scheme by securing federal funds through the Federal Highway Administration for the 41st
6 Street Project—a four lane overpass over railroad tracks. The 41st Street Project will replace an
7 at-grade rail crossing on 36th Street, the northern border of the Landfill Site. The 41st Street
8 Project includes approximately 1400 linear feet of roadway improvements, four to five travel
9 lanes, bicycle lanes, and sidewalks. This will create approximately 6 acres of new impervious
10 surface.

11 27. The overpass will set down on the Landfill Site and will connect to a temporary
12 access road to the north. Because the weight of the roadway will cause the landfill to sink, the
13 first stage of construction will be to “preload” the site to compact the material in the landfill.
14 The City anticipates that preloading will begin in summer 2001. Upon information and belief,
15 however, the City has not yet begun any preloading.

16 28. The next stage in construction, which will occur approximately 18 months after
17 the preloading, will be to drill the bridge’s foundations. The foundations will be drilled into the
18 landfill, creating the potential for leaching of contaminated materials into the underlying layers.

19 29. The 41st Street Project has been designed to accommodate the relocation of
20 Burlington Northern Santa Fe Railroad tracks, which now run along the Snohomish River
21 through the Simpson Site and will be relocated to run under the new 41st Street overpass.

22 30. The City has stated that the purpose of the 41st Street Project is to allow access to
23 the proposed Riverfront Parkway and proposed development along the Snohomish River on the
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1 Simpson Site. In fact, the City has referred to the Riverfront Parkway as “Phase 2” of the 41st
2 Street Project.

3 Endangered Species Act Consultation

4 31. Under the Endangered Species Act, 16 U.S.C. § 1536(a)(2), “[e]ach federal
5 agency shall, in consultation with and with the assistance of the Secretary, insure that any action
6 authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued
7 existence of any endangered species or threatened species . . .” or “result in the destruction or
8 adverse modification of [the designated critical] habitat” of a listed species.

9 32. Federal agencies must consult with NMFS whenever their actions may affect a
10 listed salmon species or its designated critical habitat. 50 C.F.R. § 402.14. NMFS must then
11 issue a biological opinion, considering the best available science, that determines if the action is
12 likely to jeopardize the species or result in adverse modification of its critical habitat. 16 U.S.C.
13 § 1536(a)(2). If so, NMFS shall suggest, if possible, reasonable and prudent alternatives that it
14 believes will avoid jeopardy and adverse modification. 16 U.S.C. § 1536(b)(3)(A).

15 33. The federal funding received from the Federal Highway Administration triggered
16 ESA consultation on the 41st Street Project and the requirement to ensure that the project would
17 not jeopardize listed species or destroy or adversely modify critical habitat.

18 34. On October 6, 2000, the Washington State Department of Transportation
19 (“WSDOT”), the designated non-federal representative for the Federal Highway Administration,
20 provided NMFS with a letter determining that the 41st Street Project would have no effect on
21 listed species. In response, NMFS advised WSDOT and the City that the 41st Street Project
22 appeared likely to adversely affect chinook salmon and requested a more rigorous evaluation of
23 its potential harmful effects.

35. WSDOT provided NMFS with a revised biological assessment on January 5, 2001, finding that the 41st Street Project may affect chinook but was not likely to adversely affect the species. NMFS again did not agree with this finding and identified several direct effects, as well as effects from several interrelated and interdependent actions, such as the river road and development of the Simpson Site and Landfill Site, that would harm listed salmon.

36. On April 5, 2001, the State of Washington informed NMFS that WSDOT would potentially lose some of the federal funding for the 41st Street Project if consultation was not concluded by May 11, 2001. NMFS faced increasing pressure from the City to conclude consultation and allow the project to proceed as planned. NMFS informed the City of additional information needed to conclude consultation and met with the City twice during April.

37. On May 11, 2001, NMFS issued a Biological Opinion concluding that the 41st Street Project was not likely to jeopardize Puget Sound chinook or destroy or adversely modify their designated critical habitat.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violations of the ESA and APA by NMFS Scope of the Biological Opinion Unduly Narrow

38. Pursuant to ESA § 7(a)(2), NMFS must review and analyze the effects of the 41st Street Project on threatened Puget Sound chinook salmon and its designated critical habitat.

39. NMFS’s regulations define the scope of the consultation. The consultation must examine the effects in the “action area,” which “means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02.

1 40. Further, the “effects of the action”

2 refers to the direct and indirect effects of an action on the species or critical
3 habitat, together with the effects of other activities that are interrelated or
4 interdependent with that action, that will be added to the environmental baseline.
5 The environmental baseline includes the past and present impacts of all Federal,
6 State, or private actions and other human activities in the action area, the
7 anticipated impacts of all proposed Federal projects in the action area that have
8 already undergone formal or early section 7 consultation, and the impact of State
9 or private actions which are contemporaneous with the consultation in process.
10 Indirect effects are those that are caused by the proposed action and are later in
11 time, but still are reasonably certain to occur. Interrelated actions are those that
12 are part of a larger action and depend on the larger action for their justification.
13 Interdependent actions are those that have no independent utility apart from the
14 action under consideration.

15 Id.

16 41. The biological opinion must examine the “cumulative effects,” which “are those
17 effects of future State or private activities, not involving Federal activities, that are reasonably
18 certain to occur within the action area of the Federal action subject to consultation.” Id.

19 42. The action area for the 41st Street Project extends up the Snohomish River and
20 includes the riparian areas along the Lowell River Road. The 41st Street Project will allow
21 development of the Riverfront Parkway, which will connect with the Lowell River Road. The
22 increased traffic along the Lowell River Road, the development caused by increased access, and
23 wetlands fill and bank hardening associated with the road are indirect effects of the 41st Street
24 Project. The action area also includes the upstream proposed athletic fields.

25 43. NMFS, however, defined its action area narrowly and excluded upstream and
26 riparian area impacts above Snohomish River Mile 7.

27 44. The relocation of the railroad tracks, the Riverfront Parkway, and the
28 development of the Simpson Site and Landfill Site are interrelated and interdependent actions.
29 NMFS acknowledged that these interrelated and interdependent actions “could retard the long

1 term improvement of impaired off-channel and refugia habitat, and floodplain activity.”

2 Biological Opinion at 24.

3 45. NMFS failed to analyze the effects from those actions and instead opted for a
4 piecemeal approach to consultation. This segmentation allows the 41st Street Project to proceed
5 without a full accounting of the harmful impacts of the larger development plan on threatened
6 chinook salmon and their habitat.

7 46. By failing to correctly define the action area and by failing to analyze the direct,
8 indirect, and cumulative impacts of all interrelated and interdependent actions, NMFS’s actions
9 and omissions are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance
10 with the law and are reviewable under the APA, 5 U.S.C. §§ 701-706.

11 SECOND CLAIM FOR RELIEF

12 Violations of the ESA and APA by NMFS
13 With Respect to the Finding of No Jeopardy

14 47. ESA § 7(a)(2) requires NMFS to review projects to determine if they are likely to
15 jeopardize the continued existence of any endangered or threatened species. NMFS must use the
16 best available scientific information in its biological opinion.

17 48. The relocation of the Burlington Northern Santa Fe Railroad tracks will have
18 short-term and long-term impacts on threatened salmon. However, NMFS relied on the
19 possibility that unspecified best management practices would reduce short-term potential
20 harmful impacts, and NMFS failed to analyze the long-term impacts of the relocation of the
21 railroad tracks.

22 49. The 41st Street Project will increase water volume during peak flows above the
23 six-month storm event. Peak storm flows will occur more frequently in Bigelow Creek and the
24 increase in volume and duration of peak discharges will increase turbidity and may increase

1 localized contaminant loading in the Snohomish River. Stormwater collected from the roadway
2 has the potential to carry toxicants, yet will not be treated above the six-month storm event. It is
3 possible that stormwater run-off below the six-month storm event mark will be treated within the
4 wetland buffers, an option that will further degrade the wetland functions.

5 50. NMFS incorrectly classified the water quality in the action area as “at risk,” as
6 opposed to “not properly functioning.” This misclassification limited NMFS’s analysis of the
7 harm caused by the Project’s degradation of water quality.

8 51. By missing these critical impacts in its jeopardy analysis and failing to use the
9 best available science, NMFS’s actions and omissions are arbitrary, capricious, an abuse of
10 discretion, and otherwise not in accordance with the law and are reviewable under the APA, 5
11 U.S.C. §§ 701-706.

12 THIRD CLAIM FOR RELIEF

13 Violation of the ESA and the APA by NMFS 14 With Respect to the Finding of No Destruction or Adverse Modification of Designated Critical Habitat

15 52. ESA § 7(a)(2) requires NMFS to ensure that a project will not “result in the
16 destruction or adverse modification of [the designated critical] habitat” of a listed species.

17 53. NMFS failed to address the effects of the 41st Street Project on critical habitat.
18 The Biological Opinion makes clear that the 41st Street Project and the interrelated and
19 interdependent actions will continue to degrade channel habitat, yet the biological opinion lacks
20 an independent analysis of whether the 41st Street Project adversely modifies the designated
21 critical habitat of Puget Sound chinook.

22 54. NMFS’s actions and omissions are arbitrary, capricious, an abuse of discretion,
23 and otherwise not in accordance with the law and are reviewable under the APA, 5 U.S.C. §§
24 701-706.

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Violation of the ESA and APA by NMFS
For Failing to Include and Implement All Reasonable and Prudent Measures

55. ESA § 7(b)(4) requires NMFS to issue an incidental take statement whenever a proposed federal agency action will not jeopardize a protected species, but will result in incidental take of members of the species. 16 U.S.C. § 1536(b)(4). The incidental take statement must specify “those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact” and “the terms and conditions . . . that must be complied with by the Federal agency . . . to implement the measures.” *Id.*

56. In other situations, NMFS has recommended riparian buffers of 200 feet for rivers and streams and 100 feet for wetlands. NMFS did not include comparable buffers widths as a reasonable and prudent measures designed to minimize take.

57. In other fora, NMFS has recommended that stormwater run-off be treated and detained. NMFS did not require stormwater treatment and detention beyond the six-month storm event occurrence.

58. NMFS violated § 7(b)(4) of the ESA, 16 U.S.C. § 1536(b)(4), by issuing an incidental take statement that fails to include these reasonable and prudent measures to minimize incidental take of threatened Puget Sound chinook salmon.

59. NMFS's actions and omissions are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law and are reviewable under the APA, 5 U.S.C. §§ 701-706.

1 PRAYER FOR RELIEF

2 WHEREFORE, the plaintiffs respectfully request that the Court:

3 A. Declare NMFS's biological opinion on the 41st Street Project invalid under the
4 APA, 5 U.S.C. § 706(2)(A), because the scope of the biological opinion is unduly narrow; it
5 misses key impacts on threatened Puget Sound salmon; it runs counter to the evidence before the
6 agency and prior determinations made by the agency; it fails to independently assess the
7 project's impact on designated critical habitat; and it authorizes the Federal Highway
8 Administration, the WSDOT, and the City of Everett to proceed with actions that are likely to
9 jeopardize threatened Puget Sound chinook salmon and result in adverse modification of the
10 species' designated critical habitat within the meaning of ESA § 7(a)(2) and is thus arbitrary and
11 capricious, and contrary to the ESA and its implementing regulations, in violation of the ESA § 7
12 and the APA, 5 U.S.C. § 706;

13 B. Order NMFS to rescind the biological opinion and the incidental take statement
14 issued in conjunction with it;

15 C. Award plaintiffs their costs and attorneys' fees in this action pursuant to the Equal
16 Access to Justice Act, 28 U.S.C. § 2412, and the ESA, 16 U.S.C. § 1540(g)(4); and

17 D. Grant such other and further relief as the Court may deem just and proper.
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1 DATED this 18th day of July, 2001.

2 Respectfully submitted,

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